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allow others to ride;¹⁹ (2) the rider usually has notice, through "No Riders" signs or common knowledge, that the driver has no authority to allow him to ride; (3) the injured rider will have an action against the driver so he is not left without redress;²⁰ and (4) last, but by far the most important, is the fact that the whole doctrine of respondeat superior places liability on one individual for the wrongs committed by another and such a doctrine should be applied with caution and circumspection.

The problem which has been discussed in this note is indeed very difficult. It would be impossible to say categorically that either one of the solutions is wrong, for both can be supported by reason and authority. It is clear, however, that the solution adopted and followed by the Kentucky court, in its latest decisions, is that the employer will be liable for the injuries inflicted upon the rider by his employee when they are of such a character as would render one liable to a trespasser.

ROBERT C. MOFFITT

RIGHT OF PRIVACY COLLECTION CASES — LETTER OF CREDITOR TO DEBTOR'S EMPLOYER

In the recent case of *Voneye v Turner*,¹ the Kentucky Court of Appeals was confronted with a question arising from the actions of a zealous creditor in his attempt to collect a debt. The court held that the creditor could write to the debtor's employer requesting his assistance in the collection of the debt without making himself liable in an action for the invasion of the debtor's right of privacy.

It is the purpose of this note to present the current position of the courts on the question of the right of privacy in the process of debt collection, and the extent to which the courts have held certain methods employed by creditors to be invasions of the individual's right of privacy. Although this note will not cover all acts which con-

¹⁹ The fact that the act was forbidden does not of itself relieve the master of liability but it should be considered in determining the scope of employment. *Smith v. Munch*, 65 Minn. 256, 68 N.W. 19 (1896); *Limpus v. London Omnibus Co.*, 1 H. & C. 526, 158 Eng. Rep. 993 (Ex. 1862); *TIFFANY*, AGENCY 109 (2d ed. 1924).

²⁰ The lack of financial responsibility of the servant is usually stated as the reason for supporting the doctrine of respondeat superior. *MECHEM*, AGENCY 328 (3d 1923). However it would seem that this consideration should not be as controlling today as it was when this doctrine originated, for employees today are financially much stronger than were the slaves and servants of the eighteenth century.

¹ 314 Ky. — 240 S.W. 2d 588 (1951).

stitute a violation of the right of privacy, to present a clear picture it will be necessary to give a brief review of the development of this doctrine.

During the past fifty years the courts have gradually come to recognize the doctrine of right of privacy as an independent and distinctive legal concept. This phrase was first introduced by a law review article in 1890.² Its origin may be found in the era of "yellow journalism" where reporters in competition for a story were bound by no code of ethics, and photographers and advertisers willingly sacrificed private feelings to increase their individual gains.³ As declared by Warren and Brandeis "the press is overstepping in every direction the obvious bounds of propriety and decency"⁴ This doctrine has been recognized by the majority of courts which have considered the question.⁵ The social need for this doctrine did not arise until the tremendous industrial development which occurred in this country, and as stated by Dean Pound,

"It is a modern demand growing out of conditions of life in the crowded communities of today."⁶

Thus in every right of privacy case there exists a judicious evaluation of two interests: the private right to seclusion as opposed to the public right to information which may transcend the individual's right to be let alone. In determining where the individual's liberty ends and the rights of society begin, a fine line of distinction must be drawn.

The first state to consider the doctrine advanced by Warren and Brandeis was New York.⁷ In the case of *Roberson v. Rochester Folding Box Co.*⁸ the defendant, without the knowledge or consent of the plaintiff, printed and circulated about twenty-five thousand lithographic prints of the plaintiff to advertise its flour. The plaintiff sought, solely on the ground of a violation of her right of privacy, both an injunction and damages. In a four to three decision the court flatly denied the existence of the so-called right of privacy on two principal grounds: first, that the supposed right was not mentioned by any of the great commentators nor sanctioned by any precedents, and second, that the recognition of such right would open up a vast field of litigation.

This decision caused so much criticism that the New York legislature enacted in the following year a statute giving a cause of action to

² Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

³ Pound, *Interest of Personality*, 28 HARV. L. REV. 343, 363 (1915).

⁴ *Supra*, note 2 at 196.

⁵ 138 A.L.R. 22, 28.

⁶ *Supra*, note 3 at 343, 362.

⁷ *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N.E. 442 (1902).

⁸ *Ibid.*

one whose name or picture is used without his written consent for purposes of advertising or trade.⁹ Unfortunately, however, if the right of privacy is not given recognition at common law, legislation is not likely to provide adequate remedy. The history of this New York Statute is a good example.

The statute is narrow and has been strictly construed. Many flagrant violations of one's interest may not be considered violations of the right of privacy, for the court has held that the New York legislature intended for the statutory cause of action to be exclusive of any common law right of privacy. This interpretation of the statute points up the chief objection to having legislative action determine the extent to which one's right of privacy may be protected. Since this doctrine is a "catch-all" right, it must be flexible enough to meet political, social and economic changes. As stated by a leading authority on the right of privacy doctrine, "It is of the essence of the Anglo-American judicial system that it operates after the fact rather than before."¹⁰ Where there is required a fine distinction between the private rights of the individual and rights of society "the safe guard of the individual on the one hand and of the public on the other is the wisdom and integrity of the judiciary."¹¹ The common law right of privacy doctrine was originated not as the result of a fixed inherited traditional code, but was created to meet unanticipated needs. Therefore, it is better to have new applications of the doctrine depend on the need of suggested new remedies rather than upon the legislative intent to include the particular act within the statute.

The absence of precedent affirming the existence of the right of privacy doctrine was one of the principal grounds for this first New York decision repudiating the doctrine. But the courts which have since recognized the doctrine have disregarded these objections. In the first case supporting the doctrine:

"The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the law-making power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case although there be no precedent, the common law will judge according to the law of nature and the public good."¹²

⁹ N. Y. Civil Rights Law sec. 50, 51.

¹⁰ Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1940).

¹¹ *Supra*, note 10 at 526.

¹² *Pavesich v. New England Mut. L. Ins. Co.*, 122 Ga. 190, —, 50 S.E. 68, 72 (1905).

In almost every case where one is attempting to apply the right of privacy doctrine he will be met with the answer that there is a lack of precedent for such a remedy, but the courts must judge according to the *law of nature* and the *public good*. If the court believes in weighing the interests involved that the injury to individual rights is too great a sacrifice for the consequent advantages to society, the doctrine should be extended to protect such interest regardless of precedent. In the principal case the fact that there is no direct precedent should not cause the court to hesitate to extend the doctrine to include the debtor's claim. The important question in the Voneye case is whether the *need* is so great as to require the extension of the doctrine to restrict the practice of loan companies informing the debtor's employer of the delinquent debt?

Another reason why the court in the *Roberson* case¹³ refused to recognize the right was that to do so would open up a vast amount of litigation. In the states that have recognized the right, experience has tended to disprove such a contention. As stated in the *Pavesich* case that the fact that such a recognition of a right of privacy would involve many cases near the borderline between the rights of the individual on the one hand and the right of the public on the other, and that numerous cases would present perplexing questions, is not a good ground for denying the existence of any right or refusing to give relief in a case where it is clearly shown that a legal wrong has been done.¹⁴ This contention may be presented as a reason why the privacy doctrine should not be extended to include collection cases based on facts similar to the noted cases. It is the belief of the writer that the courts of our commonwealth are capable of making "short shrift" of unfounded and trifling claims, and if the practice of creditors results in a large number of meritorious claims this would only indicate the need for a remedy against such wrong. It may be pointed out that it has never been the practice of our courts to sacrifice the rights of an individual merely to decrease our courts dockets. One of the recognized objectives of our courts is to protect the absolute and inviolate rights of the citizens of this Commonwealth to be "let alone" Is not the recognized right of a debtor to be free from interference with his contractual obligations made outside the scope of his employment worthy of protection from an unauthorized interjection of his employer?

There are a number of right of privacy cases from other jurisdictions involving charges that creditors have gone to unlawful extremes

¹³ *Supra* note 7.

¹⁴ *Pavesich v. New England Mut. L. Ins. Co.*, 122 Ga. 190 (.....), 50 S.E. 68, 72 (1905).

in collecting debts. The Supreme Court of Iowa¹⁵ affirmed a judgment awarding damages to a woman for mental pain and anguish, suffered as a result of receiving abusive and threatening letters. A coal company to which the plaintiff had become indebted in the sum of \$28.75 had placed its claim in the hands of the defendant. Letters written by the defendant contained threats to sue and to appeal to the woman's employer, stating: "we will bother him until he is so disgusted with you that he will throw you out the back door." The court, affirming a judgment for the plaintiff, said. "A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to *proper legal procedure* to enforce such payment. In this case the jury could well find that the appellants exceeded their legal rights." ¹⁶ (Italics writer's.) It is of interest to note that the court specifically mentioned the propriety of threatening proper legal procedure available to a creditor in the collection of delinquent debts.

The Missouri Court¹⁷ has held that the words 'Bad Debt Collecting Agency printed in large bold type on envelopes mailed to a debtor, *especially when mailed to him in care of his employer*, constituted a libel as tending to expose him to public hatred, contempt, or ridicule, or deprive him of the benefit of public confidence.¹⁸ The court stated that the act of the creditor was "well devised to attract the attention of those with whom he was most intimately connected, and without whose respect and good opinion the life of a sensitive woman would soon become a burden and unendurable."¹⁹ The Missouri Court expressly pointed out the more serious nature of the act of the creditor in mailing the letter in care of the employer.

The question again arose in a recent Louisiana case.²⁰ A creditor who in an attempt to collect payment of a debt of \$1.45 due him, sent a letter to the debtor's employer asking his assistance in the collection of the debt and threatening legal action in case the same was not paid. The creditor also enclosed a paper simulating in form and appearance an official document signifying court proceedings in which the amount of the debt was erroneously stated to be more than actually due. The court pointed out that while it was doubtful whether the writings in question were libelous per se, recovery had been permitted in some cases on the ground of right of privacy, and held that under the jurisprudence of Louisiana the acts of the creditor constituted an action-

¹⁵ Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932).

¹⁶ *Id.* at — N.W. at 28.

¹⁷ State v. Armstrong, 106 Mo. 395, 16 S.W. 604 (1891).

¹⁸ *Id.* at — S.W. at 609.

¹⁹ *Ibid.*

²⁰ Quina v. Roberts, 16 So. 2d 558 (1944).

able wrong. The creditor introduced evidence to show that this was a common practice of mercantile concerns, but the court stated that this in no way detracted from the self-evident fact that it is onerous. The court further stated the letter was "issued with the intention of invoking his (employers) influence and control over the plaintiff (debtor) as a means of forcing the latter, through fear of discharge or otherwise, to liquidate the small balance of his indebtedness to it."²¹

The contention has been made in these collection cases that the purpose of a letter by a creditor to the debtors employer is not to coerce, but to write a courteous and friendly letter eliciting the aid of the employer in "any manner in which he could assist." The question immediately arises, by what method does the creditor anticipate assistance by the employer other than exertion of the economic duress implicit in an order to his employee to pay the debt? The reaction of an employer upon receipt of such a correspondence was adequately displayed in a case which occurred in Nebraska.²² The Chief Clerk of the Nebraska Power Company, who was the debtors superior, testified as to the receipt of a letter written him. This letter purported to set out the transaction between the parties and to threaten garnishment of the debtors wages. The employer talked to the employee about it and told him:

"Our company won't have men working for us who had their salaries garnisheed, and if in case we had anything like that, we would have to do one thing or the other, either pay the bills or have to dismiss him."²³

The Nebraska court in allowing a recovery said, "The distinction seems to be in all of the cases as between an act or series of acts done wilfully (sic) and purposely or maliciously and acts which are merely the result of negligence."²⁴ Although the creditor in this case committed a series of acts the court stated that "an act" may be sufficient if committed intentionally.

A Georgia case,²⁵ often cited as authority to deny the debtor a right of privacy action, is clearly distinguishable from the Voneye case on its facts. It was held that a creditor, by sending a telegram to an alleged debtor threatening him with legal action in default of immediate payment, was not liable for violation of the plaintiffs right

²¹ *Id.* at — So. 561.

²² *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

²³ *Id.* at — N.W. 425.

²⁴ *Id.* at — N.W. 426.

²⁵ *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E. 2d 225 (1950).

of privacy. The Georgia courts recognized the rule permitting recovery for invasions of the right of privacy but would not permit recovery upon the facts, saying: "it is plain that a creditor has a perfect right to send a *debtor* a telegram in good faith and threaten legal action if the default continues."²⁶ This case can be easily distinguished from the noted case on its essential facts. One concerns itself with the sending of the communication to the *debtor*; the other involves the sending of the communication to the debtor's employer.

The Georgia court also stated that: "If these principles did not apply a creditor would prefer to proceed with legal action without warning to a debtor in preference to running the risk of being subjected to an action for the violation of privacy rights in the event he was honestly mistaken in his view that the debt was past due."²⁷ This observation of the court is sound. It certainly would be an unwarranted extension of the doctrine to hold that a creditor could not inform the debtor of the existence of the debt and request its payment. It was also noted by the Georgia Court that the employees of the telegraph company who were incidentally informed were not alleged to have been acquainted with the complainant. This is clearly distinguishable from a case where the information is relayed to one's employer.

The only recent opinion denying recovery is in the Indiana case of *Patton v. Jacob*.²⁸ The case is practically on all fours with the present case on the facts. The complainant was denied recovery, the court saying: "If a debtor is to have a cause of action for the violation of his right of privacy merely because his creditor informs his employer of the facts concerning a valid debt in the hope that such action may facilitate or even coerce its payment, we consider it more fitting that such right be created and defined by the legislature rather than by a judicial decision for which we can find no clear and satisfactory precedent."²⁹

The weight of the Indiana case as a precedent for the Kentucky Court of Appeals is somewhat diminished by the fact that the Indiana court has been reluctant in its adoption of the right of privacy doctrine. The doctrine was recognized for the first time in 1946,³⁰ and then only as a basis for injunctive relief in equity. The *Patton* case was the first time the Indiana court recognized the applicability of the doctrine to an action at law to recover resulting damages. The Indiana court was

²⁶ *Id.* at — S.E. at 227.

²⁷ *Ibid.*

²⁸ 118 Ind. App. 358, 78 N.E. 2d 789 (1948).

²⁹ *Id.* at — N.E. at 792.

³⁰ *Mavity v. Tyndall*, 117 Ind. App. 291, 66 N.E. 2d 755 (1946).

clearly in error when it stated in its opinion, "There are comparatively few decisions anywhere, and none in Indiana, in which one's right of privacy has been held to have been invaded by an attempt of a creditor to collect a debt."³¹

The existence of the right of privacy in Kentucky is not doubted. In fact, this state was one of the first jurisdictions to recognize the right of privacy as a common law right entitled to protection. It was first referred to in 1837 by Judge Williams in his dissenting opinion in the case of *Grigsby v Breckinridge*.³² Soon after the publication of the Warren and Brandeis article the right of privacy doctrine was recognized and adopted by our court when it held that the publication of a photograph without the owner's consent was an invasion of the plaintiff's right of privacy and thus actionable.³³ This case was followed by the typical right of privacy cases concerning the unauthorized display or publication of one's portrait and public use of one's name.³⁴ The only controversy which can exist pertains to the limitations of the right and its scope in particular fact situations. It is of interest to note that the Kentucky Court was the first one to extend the doctrine to include a creditor's actions in collecting a debt. In the case of *Brents v Morgan*,³⁵ the court of appeals held that a creditor's actions in his attempt to collect a debt could constitute a violation of his debtor's right of privacy. In this case the creditor, a garage owner, exhibited in his show window a sign, five feet by eight feet in size, which read.

"Notice. Dr. W. R. Morgan owes an account here of \$49.67. And if promises would pay an account, this account would have been settled long ago. This account will be advertised as long as it remains unpaid."

The court recognized that a right of privacy existed in this state when it stated:

"We are content to hold that there is a right of privacy, and that the unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion."³⁶

The correct instructions to be given on re-trial were as follows:

"If the jury believes from the evidence that the defendant, Brents, either in person or through his servant or employees caused to be placed upon the front window of his garage facing on Main Street in Lebanon, Kentucky, the notice set out in the petition and referred

³¹ 118 Ind. App. 358, 78 N.E. 2d 789, 791 (1948).

³² 2 Bush 480 (1867).

³³ *Foster Milburn Co. v. Chunn*, 134 Ky. 424, 120 S.W. 364 (1909).

³⁴ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912).

³⁵ 221 Ky. 765, 299 S.W. 967 (1927).

³⁶ *Id.* at 774, S.W. at 971.

to in the testimony, and shall further believe from the evidence that he, or his agents and servants under his instructions, *did so for the purpose of coercing payment of a debt then due plaintiff by the defendant, or for the purpose of exposing the plaintiff to public contempt, ridicule, aversion or disgrace, you will find for the plaintiff.* ³⁷
(sic) (Italics writers)

It is interesting to note that Judge Logan used the disjunctive *or* in describing the purpose for which the sign was erected. From this it may be argued that merely erecting the sign for the purpose of coercing payment would have been sufficient, without the element of public contempt. Following this line of reasoning in the principal case the fact that the letter was sent to the employer would be sufficient to constitute a cause of action if done for the purpose of coercing payment.

One of the main contentions in the Voneye case was that the letter was not sent to coerce. Does this argument seem valid? The letter was phrased in polite and courteous language, but as stated by Commissioner Van Sant in the original opinion on the noted case,

"that which we call a rose by any other name would smell as sweet."³⁸

In the Brents case the court recognized and accepted the limitations which were advocated when the doctrine was first advanced by Warren and Brandeis.³⁹ The only one of the limitations presented by the creditor as a defense in the Voneye case is that which holds that the right of privacy does not prohibit communications of matter under circumstances rendering it privileged according to the rules of libel and slander. The nature of a qualified privilege in defamation is set out in Section 596 of the Restatement of Torts as follows:

"An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that such facts exist which another sharing such common interest is entitled to know."⁴⁰

The rule is based upon the idea that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them. A leading authority expressly stated that such a letter as found in the noted case was not privileged in the following terms: "the privilege is lost if the publication is made to a person who apparently is in no position to give legitimate assistance, as where complaint is made to an employer that his employee will not pay the defendant a debt."⁴¹

³⁷ *Ibid.*

³⁸ See, Opinion Voneye v. Turner, January 30, 1951.

³⁹ *Supra* note 35.

⁴⁰ II RESTATEMENT, TORTS, sec. 596 (1934).

⁴¹ PROSSER, TORTS 833 (1941).

The question of whether the sending of a letter by a creditor to the debtor's employer was privileged under the laws of libel has been answered.⁴² On no occasion has the writer discovered a case where the court has held the communication to be privileged. The primary reason for denying the privilege is that the information relayed to the employer was not in response to inquiries made by one who had a right to inquire. Where the creditor's letter brought the complaint to the notice of the employer," either as a means of inducing plaintiff to pay the debt, or for the purpose of causing his discharge, or both

"⁴³ the courts have emphasized this as an additional cause to refuse to allow the information to be privileged.

In one of the cases where the defense of privilege arose the following information of an employee was included in a letter written by a creditor to an employer: "Mr. Shiffing owes me on work done on your dies, etc. \$33. If you would consent to retain such amount out of any money due him from you, let me know by return mail."⁴⁴ The Indiana Supreme Court said: "that the letter was not a privileged communication. The information it professes to contain was volunteered, and the purpose for which it was conveyed to the appellee's employer was solely for the benefit of the writer, and was not intended to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant."⁴⁵ Applying the rule of the above cases to the Voneye case it may be reasonably assumed that the creditor-loan company upon the application of the right of privacy doctrine could not set up the defense of privilege.

Conclusion

The Legislature of our state has passed garnishment statutes by which a creditor may collect from a delinquent wage-earner, and it is reasonable to assume that it was the legislative intent for creditors to resort to this legal process in collecting these debts.

The purpose of the garnishment statute was to allow the creditor a remedy with the least amount of economic coercion being imposed upon the debtor. As a result only a stipulated per cent of the employee's wage can be taken. But in the case before us the employee has no legally imposed protective measures, hence all of his wages can be required by the employer, if he so desires, to pay the debt.

⁴² *Over v. Schiffling*, 102 Ind. 191, 26 N.E. 91 (1885).

⁴³ *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N.W. 377, 379 (1901).

⁴⁴ *Over v. Schiffling*, 102 Ind. 191, 26 N.E. 91, 92 (1885).

⁴⁵ *Id.* at — N.E. at 92.

This would place the employee in a position that the legislature did not intend.

When a financial institution loans money to individuals it must take every reasonable precaution to safeguard this investment, for the money loaned is that of the private citizen who had made deposits with the bank or has stock in the loan company. In its efforts to protect said investments the lender ordinarily requires adequate security which will assure its repayment. A loan company that engages in the unsound practice of lending money without security should not be "bailed out" by being allowed to coerce payment by informing the debtor's employer of the indebtedness with the polite request attached "would appreciate anything that you can do for me."

While in the early law redress was given only for physical interference with life and property, there came later recognition of man's spiritual nature, of his feelings and his intellect. And "now the right to life has come to mean the right to enjoy life,—the right to be let alone." There have been tremendous strides made within the last fifty years to provide a remedy for those who have been injured by an unwarranted invasion upon their rights. As is customary there is always a period where there is no remedy for the wrong because the wrong must be incurred and recognized before a remedy can be provided for it.

It is the opinion of the writer that such a wrong exists where a creditor informs the debtor's employer of the debt, and that a remedy should be provided by allowing the debtor to have a cause of action for an invasion of his "right to be let alone." In the expressive language of Dean Pound:

"To attempt to compress a developing doctrine within the conservative confines of prior concepts often stunts its natural growth."⁴⁶

WILLIAM DEEP

THE MEANING OF "ONE SUBJECT" IN THE KENTUCKY CONSTITUTION

The present Constitution of Kentucky, adopted in 1891, like most state constitutions is so detailed as to render it incapable of continued effectiveness in our rapidly changing society without continual revision. Instead of laying down broad general principles, as does the Federal Constitution, to be implemented by the legislature and inter-

⁴⁶ 39 MICH. L. REV. 526, 535 (1941).